

Ferguson v Hess Corp.
2015 NY Slip Op 31746(U)
April 24, 2015
Supreme Court, New York County
Docket Number: 106855/09
Judge: Cynthia S. Kern
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EA
4/28/15
E

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice _____

PART _____

Index Number : 106855/2009
FERGUSON, ZOE
vs
HESS
Sequence Number : 010
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 28 2015
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/24/15

CRK, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
ZOE FERGUSON,

Plaintiff,

-against-

HESS CORPORATION, ABRO MANAGEMENT
CORP., ABRAHAM SCHARF and PARK AVENUE
ASSOCIATES d/b/a MB FUEL TRANSPORT, INC.,

Defendants.
-----X

HESS CORPORATION,

Third-Party Plaintiff,

-against-

PARK AVENUE ASSOCIATES d/b/a MB FUEL
TRANSPORT, INC.,

Third-Party Defendants.
-----X

ABRO MANAGEMENT CORP.,

Second Third-Party Plaintiff,

-against-

MO'S PLUMBING & HEATING INC.,

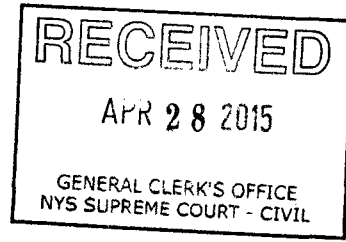
Second Third-Party Defendants.
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

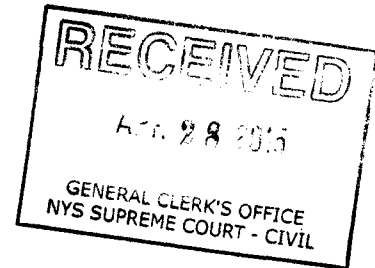
Papers

Numbered



Index No. 106855/09

DECISION/ORDER



Third-Party
Index No. 590607/11

FILED

APR 28 2015

NEW YORK
COUNTY CLERK'S OFFICE

Second Third-Party
Index No. 590928/11

Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

This is a personal injury action arising from a trip and fall on a public sidewalk sometime in 2008. Defendants Abro Management Corp. (“Abro”) and Abraham Scharf (“Scharf”) (“collectively referred to herein as “moving defendants”) now move for an Order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff’s complaint, together with all cross-claims. For the reasons set forth below, moving defendants’ motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff in this action alleges that she was injured in a trip and fall accident on September 8, 2008, on a sidewalk adjacent to the premises located at 495 West 187th Street, New York, New York (the “premises”). Specifically, plaintiff alleges as follows. As she was walking down the sidewalk, she stepped on a small metal plate in the sidewalk. As she stepped on it, the metal plate tilted upwards. Her foot then dropped in the opening below it, causing her to fall. The premises is owned by non-party Overlook Realty LLC (“Overlook”) and Abro was and is retained by Overlook to manage and maintain the premises. Defendant Scharf was a former principal of Abro. He died in 1999.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he

rests his claim.” See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact *Id.*

In the present case, as an initial matter, moving defendants’ motion for summary judgment dismissing plaintiff’s complaint and all cross-claims as against defendant Scharf is granted without opposition.

However, moving defendants’ motion for summary judgment dismissing plaintiff’s complaint and all cross-claims as against defendant Abro is denied as Abro has failed to make a prima facie showing that it cannot be held liable for plaintiff’s injuries as a matter of law. Abro contends that it cannot be held liable for plaintiff’s injuries as it owed no duty to plaintiff as it was only the managing agent of the premises and not the owner. In support of this position, Abro relies solely on the First Department’s holding in *Sweeney v. Herman Management, Inc.*, 85 A.D.2d 34 (1st Dept 1982), wherein the court held that “[t]he principle has long been established that an agent acting on behalf of a disclosed principal will not be personally bound, absent clear and explicit evidence of the agent’s intention to substitute or add his personal liability for or to that of his principal.” Abro’s reliance on *Sweeny* is misplaced as the court’s holding in *Sweeny* is not applicable to the present case. *Sweeny* was not a personal injury action, nor did it discuss the relevant standard of when the managing agent of a property can be held liable to a third-party in a negligence action. Rather, *Sweeny* dealt solely with the issue of whether a managing company could be held personally liable for breach of an agreement when it signed the agreement as an “agent” of the owner of the subject premises. As plaintiff is not seeking to hold Abro liable pursuant to a contract, *Sweeny* is simply inapplicable and, contrary to Abro’s contention, its holding does not support a finding that Abro is entitled to summary judgment in

